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MiCAR Compliance Toolkit
Market Abuse

Contents

Closing a gap in current financial services legislation, MiCAR establishes a bespoke market abuse regime for cryptoassets. MiCAR prohibits insider dealing, unlawful disclosure of inside information and market manipulation, and expressly imposes requirements relating to systems, procedures and arrangements to monitor and detect market abuse.

The market abuse provisions are not limited to asset-referenced tokens (ARTs) and e-money tokens (EMTs) – acts carried out with respect to any cryptoasset trading on a crypto platform within the EU are within scope, whether or not the transaction, order or behavior actually takes place on a trading platform. In addition, the provisions apply to actions and omissions occurring anywhere worldwide – all this to say that the MiCAR market abuse regime is broad and has extraterritorial effect.

From MAR to MiCAR

The market abuse regime established under MiCAR draws on concepts in the EU Market Abuse Regulation (MAR), which are modified to take into account the specific characteristics of cryptoassets and crypto markets. As Recital 95 of MiCAR indicates, the legislative intent was to adapt MAR to the necessities and specificities of markets in cryptoassets: **"as issuers of cryptoassets and cryptoasset service providers are very often SMEs, it would be disproportionate to apply all of the provisions" of MAR to them, and "it is therefore necessary to lay down specific rules prohibiting certain behaviors that are likely to undermine user confidence in markets in cryptoassets and the integrity of those markets".**

However, taking a closer look at MiCAR and comparing it to MAR, it appears that while the main provisions have been applied with little modifications, key exemptions provided for in MAR have not been replicated in MiCAR. While it is clear that some of these MAR exemptions are irrelevant for MiCAR (such as buy-back programs and stabilization) others might very well have been pertinent – for example, certain legitimate behaviors regarding insider dealing, accepted market practices regarding market manipulation and market soundings (though market soundings are permitted under MiCAR in the context of requirements applicable to marketing communications).

Further, it would have been helpful to industry players and crypto markets for MiCAR to have provided for specific bespoke exemptions or carveouts in the crypto context, such as clarifying that proposing or adopting a fork on a blockchain should not qualify as inside information.

It is possible that further guidance from ESMA or, ultimately, the European courts, may interpret the provisions in MiCAR in light of their derivation from MAR, and ultimately extend some of the MAR exemptions to MiCAR in a sensible manner notwithstanding that these may not be expressly provided for in MiCAR. For example, in the case of market soundings, it is clear that MiCAR contemplates the ability of issuers to conduct market soundings, but MiCAR does not define a "market sounding" in the cryptoasset context, and it may be that ESMA or the European courts may make reference to the extensive provisions in MAR on market soundings to define the limits of acceptable behavior under MiCAR. The alternative appears to be that MiCAR is interpreted strictly without the benefit of any exemptions provided for in MAR, in which case MiCAR will have a broader and more robust application than MAR, which may arguably be at variance with the ambition of the European legislator to apply a more proportionate market abuse regime.

Territorial scope

The market abuse regime in MiCAR applies to any person worldwide in relation to cryptoassets admitted to trading in the EU or in respect of which a request for admission to trading in the EU has been made, and in relation to any transaction, order or behavior worldwide concerning those cryptoassets regardless of whether the behavior takes place on a platform. In essence, any act or omission carried out in respect of in-scope cryptoassets is caught anywhere in the world, whether it takes place on-chain, off-chain, on a market or outside a market – a territorial scope parallel to that set out in MAR for financial instruments traded on an EU market.

A key issue with the wide territorial scope is the ability to sanction wrongdoers: at least at the time of writing, major cryptoasset platforms are not located in the EU, and it is therefore likely that much of the abusive behavior caught within scope of the MiCAR market abuse regime will take place outside the EU. It could therefore be challenging to enforce any sanctions when such breaches of MiCAR occur. Whether the cooperation agreements between national competent authorities and non-EU countries envisaged by MiCAR cover market abuse sanctions remains to be seen.

Further, it can be difficult to determine the territorial location of digital behaviors, given that analogue interpretations of the concept of location do not often map easily to the "decentralized" crypto landscape.

NFTs

MiCAR excludes cryptoassets which are unique and not fungible with other cryptoassets, which are commonly understood to be non-fungible tokens (NFTs) (although this exclusion is not absolute).

However, of the very few cases of insider dealing pertaining to digital assets that are known, two major cases have been linked to NFTs. Consequently, there is an open question as to whether it is sensible to exclude NFTs from the MiCAR market abuse regime.

Derivatives

Derivatives which are financial instruments under the Markets in Financial Instruments Directive (MiFID) with cryptoasset underlyings, remain within scope of MAR when traded on a regulated market, multilateral trading facility or organized trading facility. However, the underlying cryptoasset is subject to regulation under MiCAR. If the underlying cryptoasset is subject to manipulative behavior, this is likely to systematically affect the derivative referencing the cryptoasset. Consequently, there may be circumstances where acts of market manipulation with respect to the underlying cryptoasset may trigger the market abuse provisions under MiCAR **and** under MAR, depending on the impact such acts may have on the derivative and the specific fact pattern.

The same approach may apply to a financial instrument that is part of the asset reserve of an ART. On the one hand, it could be argued that the derivative or financial product and the (underlying) cryptoasset are two different products with different risk profiles and the application of two different and cumulative sanctions is therefore justified. On the other hand, the double application of market abuse provisions and sanctions to the same offending act, and the implications of the same, could also be perceived as inequitable.

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